No. 2020AP2007

In the
Wisconsin Supreme Court

CATHOLIC CHARITIES BUREAU, INC., BARRON COUNTY DEVELOPMENTAL SERVICES INC., DIVERSIFIED SERVICES, INC., BLACK RIVER INDUSTRIES, INC., AND HEADWATERS, INC.,
PETITIONERS-RESPONDENTS-PETITIONERS
V.
STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,
RESPONDENT-CO-APPELLANT
STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT
RESPONDENT-APPELLANT

On remand from the United States Supreme Court

NON-PARTY BRIEF OF WISCONSIN COUNCIL OF RELIGIOUS & INDEPENDENT SCHOOLS, ST. MARCUS SCHOOL, MARANATHA BAPTIST ACADAMY, MARANATHA BAPTIST UNIVERSITY, WISCONSIN ASSOCIATION OF CHRISTIAN SCHOOLS, AND WISCONSIN FAMILY COUNCIL

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STATEMENT OF INTEREST

Amici represent faith-based non-profit organizations that serve their faith communities and their broader communities through social services, primarily education. To embody their religious missions, many prefer or require employees to share their faith or to live in line with their community covenants. They embrace the American heritage of religious liberty as a blessing that allows them to fully live out their identity and purpose.

Wisconsin Council of Religious and Independent Schools is the largest private school organization in the state, representing 110,000 students and teachers enrolled in hundreds of private K–12 schools in Wisconsin.

St. Marcus School is the education ministry of St. Marcus Ministries. It serves approximately 1,230 students across three campuses, all located in the City of Milwaukee. Through expansion, partnership, and collaboration, St. Marcus is boldly committed to pursuing opportunities to serve as a catalyst for school reform and community-wide transformation.

Maranatha Baptist Academy is a non-profit high school in Watertown, Wisconsin, serving students and families who share its independent Baptist heritage.

Maranatha Baptist University is a non-profit, private educational institution in Watertown, Wisconsin, on a mission to

develop leaders for ministry in the local church and the world, "To the Praise of His Glory."

The *Wisconsin Association of Christian Schools* was founded in 1977 to promote Christian education in Wisconsin. It has seventeen member schools serving students grades kindergarten through twelve.

The *Wisconsin Family Council* is a 501(c)(3) nonprofit organization with a church network connecting pastors and other ministry leaders from a variety of faith backgrounds to policy issues. Many of these churches and their connected ministries engage in education, care for the pregnant, impoverished, and sick, and provide other social services.

INTRODUCTION

Amici are hesitant that this Court should take a federal Fourteenth Amendment equal-protection concept around "leveling up" and "leveling down" and shoehorn it into the First Amendment as a solution to religious neutrality problems. But even if this Court accepts the State's preferred framework of looking to legislative intent, a more comprehensive understanding of legislative intent shows clearly that—on the State's own terms—the right outcome is to expand the exemption to embrace Catholic Charities.

Not all ways to look at legislative intent are created equal.[1] One is the purpose statement of the UI statute, as the State argues. Another is the Legislature's amicus brief, as Catholic Charities argues. But there are two other sources that seem obvious and relevant: the Legislature's general statute on severability and the numerous other statutes providing religious nonprofits with exemptions. That is especially true when seen in the overall context of this Court's own past decisions on religion clause cases.[2]

ARGUMENT

I. The proper remedy for this case is specified in Wis. Stat. § 990.001(11), which provides that the invalidity of one application of a statute shall not affect other applications of that statute that are constitutional.

The parties devote substantial attention to federal law which they contend controls the remedy this Court must award in light of the U.S. Supreme Court's ruling. However, they devote limited attention to the fact that the Legislature enacted a statute

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[1] *See Serv. Emps. Int'l Union Healthcare Wis. v. WERC*, 2025 WI 29, ¶¶7–12, 416 Wis. 2d 688, 22 N.W.3d 876; *id.*, ¶65 (Dallet, J., concurring).

[2] Amici respectfully suggest that the Court consider ordering oral argument on the remedy, not because they desire to participate, but because they believe their brief and others will present important issues about which this Court may wish to ask the advocates. "The rule of law is generally best developed when issues are raised by the parties and then tested by the fire of adversarial briefs and oral arguments." *City of Janesville v. CC Midwest, Inc.*, 2007 WI 93, ¶68, 302 Wis. 2d 599, 734 N.W.2d 428 (A.W. Bradley, J., concurring).

specifying what the Court should do in situations such as these. Namely, Wis. Stat. § 990.001(11) provides:

> If any provision of the statutes of a session law is invalid, *or if the application of either to any person or circumstance is invalid*, such invalidity shall not affect other provisions *or applications* which can be given effect without the invalid provision or application.

(Emphasis added.) As this Court has explained, "Section 990.001(11) is a legislatively adopted canon of statutory interpretation relating to severability." *Schultz v. Natwick*, 2002 WI 125, ¶33, 257 Wis. 2d 19, 653 N.W.2d 266. "The canon provides that an unconstitutional provision *or an unconstitutional application of a statute* may be severed from the constitutional provisions *or constitutional applications*." *Id.* (emphasis added).

Chapter 990 of the Wisconsin Statutes is the legislatively enacted rulebook of statutory interpretation. *Id.* Its opening paragraph states, "In construing Wisconsin laws the following rules shall be observed unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature." § 990.001. This Court has, time-and-again, treated Chapter 990 as authoritative when interpreting and applying the Wisconsin Statutes. *See, e.g.*, *Burlington N., Inc. v. City of Superior*, 131 Wis. 2d 564, 579–80, 388 N.W.2d 916 (1986) ("This court is bound to observe [§ 990.001(11)] unless observance 'would produce a result inconsistent with the manifest intent of the legislature.'").

Especially in a case like this, involving the application of state law, this Court should prefer to apply this state authority over federal case law.

Here, § 990.001(11) is the end of the ballgame. It says exactly what should happen if a particular application of a statute is ruled unconstitutional—"such invalidity shall not affect other provisions *or applications*." (Emphasis added.) Here, the U.S. Supreme Court ruled that it was unconstitutional to apply § 108.02(15)(h)2. in a way that imposed a denominational preference against nonprofits affiliated with the Catholic church. Under § 990.001(11), the remedy for that constitutional defect cannot be to eliminate all other applications of § 108.02(15)(h)2. Rather, the remedy must be crafted to preserve the existing applications of § 108.02(15)(h)2. which do not run afoul of the Constitution.

Selecting this remedy, in line with this statute, is a straightforward application of this Court's age-old principle, "if any doubt exists about a statute's constitutionality, we must resolve that doubt in favor of constitutionality." *State v. Ninham*, 2011 WI 33, ¶44, 333 Wis. 2d 335, 797 N.W.2d 451. Applying the same principle in this context should lead this Court to choose the remedy that maintains the Legislature's choice to include the exemption for church-affiliated nonprofits rather than to completely cancel that choice by eliminating the exemption by judicial fiat.

The State asks the Court to do just the opposite. It essentially urges the Court to transform Catholic Charities' as-applied challenge into a facial challenge and strike down § 108.02(15)(h)2. in its entirety (an outcome Catholic Charities does not want!). This drastic remedy is inappropriate. As this Court has explained, when there exist some constitutional applications of a statute, the Court will not strike down the statute in its entirety. *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶48, 393 Wis. 2d 38, 946 N.W.2d 35 ("A facial challenge requires a showing that all applications of the law are unconstitutional.").

Here, there are countless applications of § 108.02(15)(h)2. that are unquestionably constitutional (as amici can attest). Depriving amici and others of those constitutional applications of § 108.02(15)(h)2. is not an appropriate way to remedy the State's unconstitutional application of § 108.02(15)(h)2. to Catholic Charities. Complete invalidation is not called for under the Constitution, and it is foreclosed by § 990.001(11)'s instruction for a more narrowly tailored remedy.

It's quite simple: the Legislature's directive under the severance statute is to add Catholic Charities into the exemption rather than eliminate the exemption for hundreds of religiously affiliated nonprofit organizations.

II. The Legislature's manifest intent demonstrates it would favor preserving § 108.02(15)(h)2.'s application to the countless religiously affiliated non-profit organizations who currently claim the exemption.

There are two additional markers of legislative intent that further demonstrate that the Legislature would have preferred a remedy that preserves the constitutional applications of Wis. Stat. § 108.02(15)(h)2.'s exemption: (1) the text of the exemption itself, and (2) related statutes extending exemptions to religiously affiliated non-profit organizations in other contexts.

First, the fact that the Legislature chose to enact § 108.02(15)(h)2. is strong evidence that the Legislature would prefer a remedy that permits the provision's ongoing existence. *See Kaul v. Wis. State Legislature*, 2025 WI 23, ¶44, 416 Wis. 2d 322, 21 N.W.3d 513 ("It is the 'text of the statutes' by which the Legislature announces its policy decisions and how they may be achieved."). Paragraph (h) of § 108.02(15) includes three categories of exemptions: (1) an exemption for those employed by a church or group of churches, (2) an exemption for non-profits affiliated with a church or group of churches, and (3) ministers of a church. Taken together, the three exemptions in § 108.02(15)(h) demonstrate a legislative policy choice to broadly exempt employees of church and church-related entities from UI taxation. This Court's remedy should respect that choice and preserve the many constitutional applications of § 108.02(15)(h)2. To do otherwise would blast a large

hole in the legislative policy embodied in the whole of § 108.02(15)(h).

Second, when analyzing how the Legislature would have intended a statutory provision to work when declared unconstitutional in part, it is also useful to look at other statutes the Legislature enacted. *State v. McKee*, 2002 WI App 148, ¶18, 256 Wis. 2d 547, 648 N.W.2d 34 ("Another way to ascertain legislative intent . . . is to examine related statutes to see if they shed light on the legislature's intended application of the statute under examination."). Consideration of related statutes can shed light on whether the Legislature would have preferred a remedy that slightly expands an exemption or a remedy that eliminates it entirely.

The Legislature has enacted a broad array of exemptions for religiously affiliated non-profit organizations. The UI tax exemption in § 108.02(15)(h)2. is simply one exemption in a quilt of exemptions that religiously affiliated non-profits enjoy. Taken together, the following exemptions for religiously affiliated non-profits exhibit a strong legislative preference for a judicial remedy that preserves § 108.02(15)(h)2. exemption.

- Wis. Stat. § 70.11(4)(a)1. creates a property tax exemption for property owned "by churches or religious, educational or benevolent associations."

- Wis. Stat. § 70.11(11) creates a property tax exemption for "any Bible camp conducted by a religious nonprofit corporation organized under the laws of this state."
- Wis. Stat. § 77.54(9a)(f) exempts non-profits organized exclusively for religious purposes from sales and use taxation.
- Wis. Stat. § 111.337(2)(am) exempts non-profit organizations that are "primarily owned or controlled by" religious associations from prohibitions on employment discrimination based on creed where the job description "is clearly related to the religious teachings and beliefs of the religious association."
- Wis. Stat. § 961.115 exempts members of the Native American Church from prohibitions on the "use of peyote and mescaline" in religious ceremonies.
- Wis. Stat. § 157.11(10) exempts cemeteries that are "affiliated with a religious association" from certain improvement and care requirements.
- Wis. Stat. § 563.11 permits religious organizations to conduct bingo games, exempting them from general gambling prohibitions, provided the organization obtains a license.

These exemptions demonstrate the Legislature's preference for liberally exempting religious non-profits from requirements that might impede religious practice. They reinforce that the Legislature would want § 108.02(15)(h)2. to remain available for the many religious non-profits that depend on it.

III. This Court's precedents reinforce that the remedy it fashions should favor more religious liberty and minimize the risk of excessive state entanglement with religion.

The State and Catholic Charities both focus on federal case law, but this Court has its own well-developed body of religion-related precedents that consistently reflect two principles: a broad embrace of religious liberty and a healthy skepticism of church-state entanglement. Both principles should lead this Court to favor a resolution that includes Catholic Charities within the exemption rather than creating potential establishment and free-exercise issues down the road. *See Kenosha Cnty. DHS v. Jodie W.*, 2006 WI 93, ¶20, 293 Wis. 2d 530, 716 N.W.2d 845 ("Where the constitutionality of a statute is at issue, courts [should] attempt to avoid an interpretation that creates constitutional infirmities."); *Am. Family Mut. Ins. v. DOR*, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998) ("A court should avoid interpreting a statute in such a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional.").

First, this Court has consistently shown a solicitude for religious exercise. In *State v. Miller*, Justice Janine Geske, writing for a unanimous Wisconsin Supreme Court, explained that "the drafters of our constitution created a document that embodies the ideal that the diverse citizenry of Wisconsin shall be free to exercise

the dictates of their religious beliefs." 202 Wis. 2d 56, 65, 549 N.W.2d 235 (1996). The Court rejected the U.S. Supreme Court's narrow view of free exercise claims in *Employment Division v. Smith*, 494 U.S. 872 (1990), and instead decided "that the guarantees of our state constitution will best be furthered through continued use of the compelling interest/least restrictive alternative analysis of free conscience claims." *Miller*, 202 Wis. 2d at 69; *accord Coulee Cath. Sch. v. LIRC*, 2009 WI 88, ¶60, 320 Wis. 2d 275, 768 N.W.2d 868 (observing that our Wisconsin Constitution "contains extremely strong language, providing expansive protections for religious liberty"). Though the plaintiffs in this case have not argued their case based on the Wisconsin Constitution, this Court can appreciate that it should adopt a remedy that avoids creating a future question under the state constitution.

At the same time, this Court has also warned, "The Constitution prohibits the excessive entanglement of the state in religious matters." *St. Augustine Sch. v. Taylor*, 2021 WI 70, ¶42, 398 Wis. 2d 92, 961 N.W.2d 635. In that case, this Court guarded against "any investigation or surveillance into the practices of" a religious institution. *Id.*, ¶48; *accord Wis. Conf. Bd. of Trs. v. Culver*, 2001 WI 55, ¶21, 243 Wis. 2d 394, 627 N.W.2d 469 (A.W. Bradley, J.) (holding that the Court must "avoid an entanglement with religion that would run afoul of the Establishment Clause").

Requiring faith-based institutions to participate in the UI system is an invitation to entanglement, both for taxation and for awarding benefits. *See Walz v. Tax Com. of New York*, 397 U.S. 664, 674 (1970) ("Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."); *Rojas v. Fitch*, 928 F. Supp. 155, 165 (D.R.I. 1996) ("Because of the [exemption] statutes, the federal government and state government need not continuously monitor and audit exempt religious organizations to ensure compliance with [the Federal Unemployment Tax Act] and the Rhode Island Employment Security Act."), *aff'd* 127 F.3d 184, 189 (1st Cir. 1997) ("[A]s the district court correctly reasoned, entanglement concerns are in fact reduced through the adoption of the exemptions in this case.").

As this Court weighs the proper remedy, it should bear in mind that the Wisconsin Constitution has a strong preference for religious freedom, and this Court has an appropriate wariness of policies that invite entanglement between church and state.

CONCLUSION

For the foregoing reasons, Amici urge the Court to rule that Catholic Charities is entitled to claim the tax exemption under Wis. Stat. § 108.02(15)(h)2.

Dated: November 3, 2025

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,449 words.

Dated: November 3, 2025.

Electronically Signed by Daniel R. Suhr
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